

**TEXAS DEPARTMENT OF MOTOR VEHICLES  
CASE NO. 19-0009703 CAF**

**MARLA S. QUIRSFELD,  
Complainant**

v.

**GULF STATES TOYOTA, INC.,  
Respondent**

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**BEFORE THE OFFICE**

**OF**

**ADMINISTRATIVE HEARINGS**

**DECISION AND ORDER**

Marla S. Quirsfeld (Complainant) seeks relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 (Lemon Law) for alleged defects in her 2018 Toyota Highlander Limited. Complainant asserts that the vehicle has a defect or nonconformity which causes an antifreeze (coolant) odor from the driver's side of the vehicle after it's been driven. Gulf States Toyota, Inc. (Respondent) argued that the vehicle is operating as designed, does not have a defect, and that no relief is warranted. The hearings examiner concludes that the vehicle does not have an existing warrantable defect and Complainant is not eligible for relief.

**I. PROCEDURAL HISTORY, NOTICE AND JURISDICTION**

Matters of notice and jurisdiction were not contested and are discussed only in the Findings of Fact and Conclusions of Law. The hearing in this case convened and the record was closed on November 13, 2019, in Houston, Texas before Hearings Examiner Edward Sandoval. Edward Quirsfeld, Complainant's husband, represented Complainant at the hearing. Marla S. Quirsfeld, Complainant, was also present and offered testimony. Respondent was represented by Bill New, Field Technical Specialist. Susan Elmallah, District Customer Experience Manager, also appeared and testified at the hearing for Respondent.

**II. DISCUSSION**

**A. Applicable Law**

The Lemon Law provides, in part, that a manufacturer of a motor vehicle must repurchase or replace a vehicle complained of with a comparable vehicle if the following conditions are met. First, the manufacturer is not able to conform the vehicle to an applicable express warranty by repairing or correcting a defect after a reasonable number of attempts.<sup>1</sup> Second, the defect or condition in the vehicle creates a serious safety hazard or substantially impairs the use or market value of the vehicle.<sup>2</sup> Third, the manufacturer has been given a reasonable number of attempts to

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<sup>1</sup> Tex. Occ. Code § 2301.604(a).

<sup>2</sup> *Id.*

repair or correct the defect or condition.<sup>3</sup> Fourth, the owner must have provided written notice of the alleged defect or nonconformity to the manufacturer.<sup>4</sup> Lastly, the manufacturer must have been given an opportunity to cure the defect or nonconformity.<sup>5</sup>

In addition to these conditions, a rebuttable presumption exists that a reasonable number of attempts have been undertaken to conform a motor vehicle to an applicable express warranty if the same nonconformity continues to exist after being subject to repair four or more times by the manufacturer, converter, or distributor, or an authorized agent or franchised dealer of a manufacturer, converter, or distributor and the repair attempts were made before the earlier of: (A) the date the express warranty expires; or (B) 24 months or 24,000 miles, whichever occurs first, following the date of original delivery of the motor vehicle to the owner.<sup>6</sup>

If a vehicle is found to have a nonconformity that creates a serious safety hazard which continues to exist, the rebuttable presumption that a reasonable number of repair attempts have been performed can be established if the vehicle has been subject to repair two or more times by the manufacturer, converter, or distributor, or an authorized agent or franchised dealer of a manufacturer, converter, or distributor and the attempts were made before the earlier of: (A) the date the express warranty expires; or (B) 24 months or 24,000 miles, whichever occurs first, following the date of original delivery of the motor vehicle to the owner.<sup>7</sup>

“Serious safety hazard” means a life-threatening malfunction or nonconformity that substantially impedes a person’s ability to control or operate a vehicle for ordinary use or intended purposes, or creates a substantial risk of fire or explosion.<sup>8</sup>

## **B. Complainant’s Evidence and Arguments**

Complainant purchased a new 2018 Toyota Highlander Limited on July 27, 2018, from Fred Haas Toyota Country (Haas) in Houston, Texas.<sup>9</sup> The vehicle’s mileage at the time of delivery was 8.<sup>10</sup> Respondent provided a new vehicle limited warranty for the vehicle which provides

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<sup>3</sup> *Id.*

<sup>4</sup> Tex. Occ. Code § 2301.606(c)(1).

<sup>5</sup> Tex. Occ. Code § 2301.606(c)(2).

<sup>6</sup> Tex. Occ. Code § 2301.605(a)(1)(A) and (B). Texas Occupations Code § 2301.605(a) (3) provides a third method for a complainant to establish a rebuttable presumption that a reasonable number of attempts have been undertaken to conform a vehicle to an applicable express warranty. This section requires that the vehicle be out of service for repair for a total of 30 or more days in the 24 months or 24,000 miles, whichever occurs first, following the date of original delivery to the owner.

<sup>7</sup> Tex. Occ. Code § 2301.605(a)(2)(A) and (B).

<sup>8</sup> Tex. Occ. Code § 2301.601(4).

<sup>9</sup> Complainant Ex. 1, Motor Vehicle Buyer’s Order dated July 27, 2018.

<sup>10</sup> *Id.*

coverage for three (3) years or 36,000 miles, whichever comes first.<sup>11</sup> In addition, Respondent provided a five (5) year or 60,000 mile warranty for the vehicle's powertrain.<sup>12</sup> On the date of hearing the vehicle's mileage was 12,123. At the time of hearing the vehicle's warranties were still in effect.

### 1. Edward Quirsfeld's Testimony

Edward Quirsfeld, Complainant's husband, testified for Complainant in the hearing. He stated that they feel that the vehicle has a defect that causes the odor of antifreeze (coolant) to emit from the front driver's side of the vehicle after the vehicle has been driven. The odor cannot be detected within the vehicle and can only be noticed on the outside of the vehicle when it has been parked. Mr. Quirsfeld stated that when they test drove the vehicle prior to purchasing it they did not notice the coolant odor. They did not notice the odor until after having possessed the vehicle about a week. This was when they first noticed the odor of coolant in their garage after parking the vehicle.

Mr. Quirsfeld stated that when he took the vehicle to Haas for scheduled maintenance on October 31, 2018, he informed the service advisor of his concerns regarding smelling coolant from the front of the vehicle. Haas' service technician inspected the vehicle and did not discover a coolant leak from the vehicle.<sup>13</sup> The technician determined that Complainant may have been smelling the vehicle's coolant reservoir, "since it is vented to the atmosphere."<sup>14</sup> No repairs were performed at the time. The vehicle's mileage on this occasion was 2,217.<sup>15</sup> Mr. Quirsfeld stated that he waited a couple of hours for the vehicle and did not receive a loaner vehicle while he waited.

Complainant continued to drive the vehicle even though she continued to smell the odor whenever she drove and parked it. On January 18, 2019, Mr. Quirsfeld took the vehicle to Haas for scheduled maintenance. Mr. Quirsfeld mentioned the issue of the coolant odor to the service advisor who had Haas' service technician look into the matter. The service technician inspected the vehicle and raised the issue with Respondent's field technical specialist, Bill New.<sup>16</sup> Mr. New spoke to Mr. Quirsfeld and informed him that the odor was caused by "off gassing" and commonly occurred on Toyotas.<sup>17</sup> Mr. New stated that when the vehicle's engine runs hot, the coolant is off gassed from the reservoir and the coolant fan comes on and spreads the coolant

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<sup>11</sup> Respondent Ex. 2, Letter from Susan Pickard, Toyota Customer Relations to John Dufour, Texas Department of Motor Vehicles dated May 7, 2019, p. 2.

<sup>12</sup> *Id.*

<sup>13</sup> Respondent Ex. 1, Packet of Repair Orders submitted by Respondent, p. 4.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*, pp. 5-6.

<sup>17</sup> *Id.*

odor.<sup>18</sup> No repair was performed to the vehicle for the coolant odor. The vehicle's mileage at the time was 4,703.<sup>19</sup> Mr. Quirsfeld waited for the vehicle while the work was performed. Complainant did not receive a loaner vehicle while her vehicle was being inspected.

On February 19, 2019, Mr. Quirsfeld took the vehicle back to Haas for the issue regarding the coolant odor coming from the front of the vehicle. Mr. New inspected the vehicle's head gasket, water pump, radiator and hoses on this occasion and did not find a coolant leak in the vehicle.<sup>20</sup> Mr. New verified the coolant odor around the reservoir filler neck and vent hose.<sup>21</sup> He determined that the odor was due to off gassing.<sup>22</sup> Mr. New attached a longer piece of hose to the reservoir to redirect the odor to the bottom of the vehicle. No other repair was performed at the time. The vehicle's mileage on this occasion was 5,155.<sup>23</sup> Mr. Quirsfeld waited for the vehicle while it was being inspected. No loaner was provided to Complainant on this occasion.

Mr. Quirsfeld testified that they were not satisfied with the fix provided by Mr. New as they could still smell the coolant odor from the front of the vehicle. As a result, they filed a complaint about the vehicle with the National Center for Dispute Settlement (NCDS). The complaint was submitted to an arbitrator who conducted a hearing on April 16, 2019, at the Haas location.<sup>24</sup> Complainant, Mr. Quirsfeld, and Mr. New were present at the hearing, as was Barry Whitlock, Haas' Service Manager, and Susie Pickard, Respondent's representative, by telephone.<sup>25</sup> The arbitrator verified that a coolant odor emanated from the front of the vehicle, but determined that the odor did not substantially impair the use, value, or safety of the vehicle and denied the request for repurchase or replacement of the vehicle.<sup>26</sup> Mr. Quirsfeld testified that the arbitrator inspected the vehicle while it was parked in a breezeway at the dealer's location and that the strong wind through the area dispersed the odor and that it was not a good indicator of the strength of the odor.

Complainant filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department) on May 11, 2019, in which she complained about the coolant odor.<sup>27</sup> In addition, Complainant mailed a letter to Respondent on May 13, 2019, in which she indicated her dissatisfaction with the vehicle.<sup>28</sup>

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<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*, p. 7.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> Complainant Ex. 5, Decision in Case #6019005 issued on April 25, 2019.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*, p. 3.

<sup>27</sup> Complainant Ex. 2, Lemon Law Complaint dated May 11, 2019.

<sup>28</sup> Complainant Ex. 4, Letter to Toyota Customer Experience Center dated May 13, 2019.

Mr. Quirsfeld testified that they took the vehicle to Haas for maintenance on July 18, 2019, and raised the issue of the coolant odor coming from the front driver's side of the vehicle. Haas' service technician inspected the vehicle and did not find any leaks in the coolant system.<sup>29</sup> The technician determined that the odor was due to evaporated coolant in the coolant reservoir being vented to the atmosphere.<sup>30</sup> The technician determined that the vehicle was operating properly at the time of the repair visit.<sup>31</sup> The vehicle's mileage on this occasion was 9,625.<sup>32</sup>

Mr. Quirsfeld testified that he has taken the vehicle to other vehicle repair facilities and was told by the repair technicians that they have never heard of this type of problem before. In addition, Mr. Quirsfeld has talked to other people who own Toyota Highlanders and was told that they have not had a problem with a coolant odor coming from their vehicles. Mr. Quirsfeld also stated that he test drove a new 2019 Highlander and did not detect a coolant odor from the vehicle after the test drive.

## 2. Marla Quirsfeld's Testimony

Marla Quirsfeld, Complainant, testified in the hearing. She stated that she feels that the vehicle's resale value has been affected by the issues that she and her husband have experienced with the vehicle. She feels that no one would want to buy a vehicle from which the odor of antifreeze emanated.

Complainant stated that she has parked the vehicle in parking lots and people walking by have commented to her that the vehicle stinks. Complainant also stated that other Toyota owners have commented that such an odor is unusual.

## C. Respondent's Evidence and Arguments

### 1. Susan Elmallah's Testimony

Susan Elmallah, District Customer Experience Manager, testified for Respondent at the hearing. She stated that she had never seen the vehicle prior to the hearing date. This is the first time that she's heard of a complaint with a coolant odor coming from one of Respondent's vehicles. Ms. Elmallah also testified that Respondent issues a warranty for new vehicles which provides coverage for the vehicle for three (3) years or 36,000 miles and a separate powertrain warranty for the vehicle providing coverage for five (5) years or 60,000 miles.

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<sup>29</sup> Respondent Ex. 1, Packet of Repair Orders submitted by Respondent, p. 9.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

## **2. Bill New's Testimony**

Bill New, Field Technical Specialist, testified for Respondent at the hearing. Mr. New testified that he has worked in the automotive industry for 37 years. His first 20 years in the industry, he worked as a technician for different Toyota dealers. Mr. New has worked in his current position for the past 17 years. He is an Automotive Service Excellence (ASE) Master Certified Technician.

Mr. New testified that he inspected the vehicle on February 19, 2019, at the Haas location. He verified that the coolant odor could be detected from the front driver's side of the vehicle. He determined that a slight coolant odor was coming from around the coolant overflow bottle and around the radiator cap. There was no sign of a coolant leak in the vehicle. Mr. New stated that he inspected the vehicle under the intake, around the head gaskets, around the coolant hoses, the front cylinder head, the radiator, and the water pump, but could not detect any leaks. Mr. New stated that he feels that the problem is "off gassing" from the vehicle's reservoir bottle. This occurs when the pressure builds up in the coolant system and some of the coolant will go into the overflow bottle. The fan will come on and blow the coolant odor under the hood where the customer will smell it. Mr. New testified that he did add a hose to the reservoir lid to point the off gassing odor to the bottom of the vehicle's engine in an attempt to resolve the issue.

Mr. New testified that this is not uncommon in Respondent's vehicles when the vehicle's coolant reservoir is mounted on to the radiator. This is the first time that he's had this type of complaint regarding a Highlander, though. Mr. New stated that there is no fix for the issue. There is no way to keep the coolant odor from getting out of the coolant bottle.

### **D. Analysis**

Under the Lemon Law, Complainant bears the burden of proof to establish by a preponderance of evidence that a defect or condition creates a serious safety hazard or substantially impairs the use or market value of the vehicle. In addition, Complainant must meet the presumption that the manufacturer was given a reasonable number of attempts to repair or correct the defect or condition to conform the vehicle to an applicable express warranty. Finally, Complainant is required to serve written notice of the defect or nonconformity on Respondent, who must be allowed an opportunity to cure the defect. If each of these requirements is met and Respondent is still unable to conform the vehicle to an express warranty by repairing the defect or condition, Complainant is entitled to have the vehicle repurchased or replaced.

The first issue to be addressed is whether Complainant's vehicle has a defect or condition that creates a serious safety hazard or substantially impairs the use or market value of the vehicle. Both parties agree that the vehicle emits an odor of antifreeze (coolant) from the front left of the vehicle. Complainant feels that the odor creates a health hazard for her and her family, that it indicates that the vehicle may not be reliable, and that it affects the vehicle's resale value. Respondent indicates that the odor is a result of "off-gassing" and that it does not substantially impair the use, value, or safety of the vehicle.

A manufacturing defect is an isolated aberration occurring only in those vehicles not produced according to the manufacturer's specifications. A defectively manufactured vehicle has a flaw because of some error in making it, such as incorrect assembly or the use of a broken part. Unlike manufacturing defects, issues that do not arise from manufacturing, such as characteristics of the vehicle's design (which exists before manufacturing) or dealer representations and improper dealer repairs (which occur after manufacturing) are not warrantable defects. Design characteristics result from the vehicle's specified design and not from any error during manufacturing.<sup>33</sup> In sum, because the warranty only covers manufacturing defects, the Lemon Law does not apply to design characteristics or design defects.

The evidence indicates that the issue complained of is a design issue with the vehicle. As such, the hearings examiner must find that there is no defect with the vehicle itself. No evidence was presented to indicate that the issue *substantially* impairs the use or market value of the vehicle and it does not create a serious safety hazard. Therefore, repurchase or replacement relief for Complainant is not warranted.

On the date of hearing, the vehicle's mileage was 12,123 and it remains covered under Respondent's warranties. As such, Respondent is still under an obligation to repair the vehicle whenever there is a problem covered by the warranties.

Complainant's request for repurchase or replacement relief is denied.

### III. FINDINGS OF FACT

1. Marla Quirsfeld (Complainant) purchased a new 2018 Toyota Highlander Limited on July 27, 2018, from Fred Haas Toyota Country (Haas) in Houston, Texas with mileage of 8 at the time of delivery.

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<sup>33</sup> *Torres v. Caterpillar, Inc.*, 928 S.W.2d 233, 239 (Tex. App.—San Antonio 1996), *writ denied*, (Feb. 13, 1997).

2. The manufacturer or distributor of the vehicle, Gulf States Toyota, Inc. (Respondent), issued a new vehicle limited warranty for the vehicle which provides coverage for three (3) years or 36,000 miles, whichever occurs first. In addition, Respondent provided a powertrain warranty which provides coverage for the vehicle's powertrain for five (5) years or 60,000 miles.
3. The vehicle's mileage on the date of hearing was 12,123.
4. At the time of hearing the vehicle's warranties were still in effect.
5. Complainant feels that the vehicle has a defect or nonconformity which emits an odor of antifreeze (coolant) from the left front of the vehicle after the vehicle has been driven.
6. Complainant took the vehicle for repair to Respondent's authorized dealer, Haas, in order to address her concerns with the antifreeze odor on the following dates:
  - a. October 31, 2018, at 2,217 miles;
  - b. January 18, 2019, at 4,703 miles; and
  - c. February 19, 2019, at 5,155 miles.
7. On October 31, 2018, Haas' service technician inspected the vehicle's cooling system, but found no coolant leaks. The technician determined that Complainant was detecting the odor from the vehicle's coolant reservoir which is vented to the air.
8. On January 18, 2019, Haas' service technician spoke to Respondent's field technical specialist about the issue who informed him that the odor was caused by "off-gassing" and that it's a common issue in most of Respondent's vehicles. No repair was performed at the time.
9. On February 19, 2019, Respondent's field technical specialist inspected the vehicle and did not find any coolant leaks, although he was able to detect the antifreeze odor near the coolant reservoir's filler neck and vent hose. He determined that off-gassing was causing the odor and attached a plastic hose to the reservoir to direct the off-gassing below the vehicle's engine.
10. Complainants filed a complaint about the issue with the National Center for Dispute Settlement sometime prior to March of 2019.
11. On April 16, 2019, a hearing regarding the odor complaint was conducted at the Haas dealership by an arbitrator with the National Center for Dispute Settlement.



12. On April 25, 2019, the arbitrator issued a decision on the complaint and ruled that the odor complained of did “not substantially impair the use, value, or safety of the vehicle” and denied the request for repurchase or replacement of the vehicle.
13. On May 11, 2019, Complainant filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department).
14. On May 13, 2019, Complainant mailed a letter to Respondent advising them of her dissatisfaction with the vehicle.
15. On July 18, 2019, Complainant took the vehicle to Haas for maintenance repairs, at which time Complainant asked that the vehicle be inspected for the coolant odor issue. The vehicle’s mileage at the time was 5,155.
16. During the inspection described in Findings of Fact #15, the technician inspected the vehicle’s cooling system, but was not able to find a leak in the system. The technician determined that the odor was occurring because evaporated coolant was being vented to the atmosphere and that the vehicle was working properly.
17. On July 15, 2019, the Department’s Office of Administrative Hearings issued a notice of hearing directed to Complainant and Respondent, giving all parties not less than 10 days’ notice of hearing and their rights under the applicable rules and statutes. The notice stated the time, place and nature of the hearing; the legal authority and jurisdiction under which the hearing was to be held; particular sections of the statutes and rules involved; and the matters asserted.
18. The hearing in this case convened and the record was closed on November 13, 2019, in Houston, Texas before Hearings Examiner Edward Sandoval. Edward Quirsfeld, Complainant’s husband, represented Complainant at the hearing. Marla S. Quirsfeld, Complainant, was also present and offered testimony. Respondent was represented by Bill New, Field Technical Specialist. Susan Elmallah, District Customer Experience Manager, also appeared and testified at the hearing for Respondent.

#### IV. CONCLUSIONS OF LAW

1. The Texas Department of Motor Vehicles (Department) has jurisdiction over this matter. Tex. Occ. Code §§ 2301.601-2301.613 (Lemon Law).
2. A hearings examiner of the Department’s Office of Administrative Hearings has jurisdiction over all matters related to conducting a hearing in this proceeding, including


the preparation of a decision with findings of fact and conclusions of law, and the issuance of a final order. Tex. Occ. Code § 2301.704.

3. Complainant timely filed a complaint with the Department. Tex. Occ. Code § 2301.204; 43 Tex. Admin. Code § 215.202.
4. The parties received proper notice of the hearing. Tex. Gov't Code §§ 2001.051, 2001.052; 43 Tex. Admin. Code § 215.206(2).
5. Complainant bears the burden of proof in this matter.
6. Complainant failed to prove by a preponderance of the evidence that Respondent was unable to conform the vehicle to an express warranty by repairing or correcting a defect or condition that presents a serious safety hazard or substantially impairs the use or market value of the vehicle. Tex. Occ. Code § 2301.604.
7. Respondent remains responsible to address and repair or correct any defects that are covered by Respondent's warranties. Tex. Occ. Code §§ 2301.204, 2301.603.
8. Complainant's vehicle does not qualify for replacement or repurchase. Tex. Occ. Code § 2301.604.

### ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is **ORDERED** that Complainant's petition for replacement or repurchase relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 is hereby **DISMISSED**.

**SIGNED January 13, 2020.**



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**EDWARD SANDOVAL**  
**CHIEF HEARINGS EXAMINER**  
**OFFICE OF ADMINISTRATIVE HEARINGS**  
**TEXAS DEPARTMENT OF MOTOR VEHICLES**